

## LEGAL GUIDANCE/APRIL 1995 ISSUE

Since the Navy began awarding contracts for healthcare services, the question of how to deal with contract healthcare workers who become afflicted with an infectious disease, such as Acquired Immune Deficiency Syndrome (AIDS), has remained unresolved. What are the rights of the Government as it tries to protect its beneficiaries? What are the rights of the healthcare worker to privacy and to continue to practice his/her profession? A recent case involving the Federal Bureau of Investigation (FBI) and a contract facility, Doe v. Attorney General of U.S., 34 F.3d 781 (9th Cir. 1994), offers some clues as to the rights and obligations of each party.

Doe, who died in 1992, was a physician and director of a health facility in San Francisco, between 1984 and 1988. The facility held a contract to perform pre-employment physical examinations and annual physical examinations for FBI agents. Virtually all of the examinations--anal, vaginal, and oral cavity--were performed by Doe. Under the contract, the FBI paid the facility a fee for each examination performed. Doe's salary was based in part upon how many examinations he performed.

An FBI agent was informed by an unnamed source that Doe had Kaposi's Sarcoma, a malignancy consisting of darkened skin lesions which is associated with the AIDS infection. In an attempt to verify the information and the medical risks which might exist from Doe performing the physical examinations, the FBI questioned the facility as to whether a staff member had AIDS or Kaposi's Sarcoma. The facility neither confirmed nor denied the allegation. Instead, it informed the FBI that there were no medical risks involved because the facility adhered to standard infection control procedures. The FBI felt the response was inadequate, and, shortly thereafter, discontinued referring patients to the facility.

Doe first filed an action against the FBI alleging violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and of his privacy rights under the due process clause of the Fifth Amendment of the U.S. Constitution. Within Doe's complaint, he had admitted that he was afflicted with AIDS. Following a leak to the press, it became widely known that Doe did in fact have AIDS and that several agents had been examined by Doe.

At the time this suit was filed, this statute provided in general that, "No otherwise qualified individual with handicaps ... shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive Agency."

The District Court found that Doe did not pose a significant risk of infection during routine physical examinations if he followed appropriate medical procedures, which in fact he did. After the District Court issued a preliminary injunction, the FBI continued to contract with Doe's facility, but also gave agents a choice of two other facilities to attend for their physical examinations. As a result, Doe's income decreased substantially.

The case was then appealed to the U.S. Court of Appeals for the Ninth Circuit, Doe v. Attorney General, 941 F.2d 780 (9th Cir. 1991). The Ninth Circuit held that Doe could maintain private claims against the United States because the District Court recognized that Doe was a "handicapped individual" under Section 504 because he had AIDS, and that all but the claim for damages were rendered moot because Doe had resigned from the facility. The case was returned to the District Court for a decision on whether the FBI was liable to Doe under the Act.

On remand, the District Court found that Doe and the facility gave only conclusory answers to the FBI's questions concerning risk during physical examinations, so that the FBI was unable to tell whether its agents were at risk. The District Court concluded that the FBI was not liable to Doe because, "(i)f a plaintiff doctor will not allow the inquiry necessary to determine whether his disease poses a significant risk to patients, he is not 'otherwise qualified' for employment."

Following Doe's death, the executor of his estate appealed the District Courts judgment, denying Doe's claim for damages. Whether a person with an infectious disease is "otherwise qualified" will require individualized inquiry into the nature, duration, and severity of the risk, as well as "the probabilities the disease will be transmitted and will cause varying degrees of harm." Due to the fact that this case was an action for damages, the inquiry into whether Doe could make out a case that he was "otherwise qualified" depended on (1) whether the inquiry the FBI agents made was sufficient for the U.S. Courts of Appeals to view their actions as being based on fact rather than misinformed stereotype, and, if this inquiry was sufficient, (2) whether the information available to the FBI indicated that Doe was in fact "qualified." Based on the knowledge that was available to the FBI, it was permissible for the FBI to insist on answers to its questions about such risks and prevention. Since the requested information was not forthcoming, the only other way to try to find out if there might be a risk was to insist directly on knowing whether Doe had AIDS. The Act permits an employer to make inquiry about an individual's disability if the information sought is relevant to his ability to do the job or to the safety of patients or coworkers.

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